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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 718.

CONRAD, RUBIN & LESSER,

Petitioners,

—against—

HORACE G. PENDER, as Trustee in Bankruptcy of the Estate of David Bell Scarves, Inc., Bankrupt,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE C. LEVIN,
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225 Broadway,
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THE COURT PRESS, INC.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Statement.

This application arises out of a summary proceeding instituted pursuant to §60-d of the bankruptcy act (11 U. S. C. A. 96, d), by a trustee to re-examine a $2,500 attorneys' fee paid to petitioners whose objection to the jurisdiction of the bankruptcy court has been successively overruled by the referee, the district and circuit courts.

The issue turns on whether the payment made *twelve days* before the petition was "made in contemplation of bankruptcy". The power of the referee to act summarily in a proper case is not disputed. Jurisdiction is here challenged on the circumstances involved on the ground that payment to an attorney "to effectuate a reorganization of the corporation and a settlement with its creditors" (Peti-

tioners' Brief, pp. 2, 13) is not subject to re-examination, and this even though the retention did contemplate "continuance of the business under the supervision of an Equity Receiver, * * * a committee of creditors or a representative of the New York Credit Men's Adjustment Bureau, Inc." (p. 16, fol. 47).

The decision therefore hinges upon questions of fact which are carefully reviewed in the opinions by Circuit Judge Swan (pp. 78-83)* and District Judge Caffey (pp. 67-70).†

In view of the ruling in this Court in *Wood* v. *Henderson*, 210 U. S. 246 (1908), construing §60-d, the question has been authoritatively passed upon and requires no further consideration. Mr. Justice Day discussing the section held (210 U. S. 253):

> "It (the statute) recognizes the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him in view of *financial reverses and probable failure.* It recognizes the right of such a debtor to have the aid and advice of counsel, and, in contemplation of bankruptcy proceedings which shall strip him of his property, to make provisions for reasonable compensation to his counsel. And, in view of the circumstances, the act makes provision that the bankruptcy court administering the estate may, if the trustee or any creditor question the transaction, re-examine it with a view to a determination of its reasonableness." (Italics ours.)

Unnecessary emphasis is placed by petitioners upon the existence of some diversity of opinion on the *general* subject of attorneys' fees and their *allowance* in bankruptcy.

* Reported at 52 F. (2d) 755.

† Reported at 61 F. (2d) 771.

The cases urged bear solely on the distinction between sections 60-d and 64(b)3 (11 U. S. C. A. 104(b)3), the latter relating only to legal services rendered *subsequent* to the filing of the petition in bankruptcy, of which class of services there are none present in this case. Petitioners rendered no services after bankruptcy (Brief, p. 3), hence section 64-b(3), and cases construing that subdivision, have no application.

Wherefore, it is respectfully submitted that petitioners have shown no reason in law or in fact which would justify this court in granting a writ of certiorari.

Respectfully submitted,

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Respondent.

RESPONDENT'S BRIEF.

Statement.

This case is presented on writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed an order of the District Court for the Southern District of New York, dismissing a petition to review an order entered by the Referee in Bankruptcy in a proceeding instituted by the Trustee under § 60-d of the bankruptcy act (11 U. S. C. A. 96, d), to re-examine the reasonableness of an attorney's fee amounting to $2,500 paid to the petitioners by the bankrupt. The Referee held that the sum of $2,500 was unreasonable for the services rendered and fixed the fee in the sum of $500 and directed the return to the estate of $2,000. For the opinions below, see 52 F. (2d) 755 and 61 F. (2d) 771.

The Issue.

Petitioners raised as the sole ground of review the claim that the Referee had no jurisdiction to enter the order

herein appealed from on the ground that the payment was not made "in contemplation of bankruptcy" (fol. 71).

Petitioners insist that their retainer was to avoid bankruptcy by effecting a 50 per cent. settlement with creditors, and contemplated only an extension under creditors' control, or an equity receivership.

The Proceedings.

The original papers upon which this proceeding was instituted contained two counts, one based on § 60-d and the other on § 67-e (11 U. S. C. A. 107-e), of the bankruptcy act (fols. 6-11). The petitioners having entered objection to the power of the court to entertain the application, the Trustee on the return date withdrew the second count, which is based upon § 67-e, relating to fraudulent transfers, the Trustee conceding that with respect to the latter count, the court had no jurisdiction unless conferred by the consent of petitioners (fol. 22).

On the return day petitioners filed a cross notice moving in the alternative to dismiss the Trustee's petition on the ground that the petition "fails to state facts sufficient to constitute a claim within the jurisdiction of the said Referee and that the same is insufficient in law upon its face or in the alternative for an order striking out as irrelevant and improper" certain designated paragraphs (fol. 12).

The Referee reserved decision on this application and in order to ascertain the merits of petitioners' contention, requested the filing of a petition or affidavit outlining the services rendered (fol. 23) in order that the Court might make a preliminary finding on the question of jurisdiction, pursuant to practice indicated by the circuit court in *Re Falk*, 30 F. (2d) 607, (C. C. A. 2).

Petitioners thereupon filed the affidavit of a member

of their firm, William W. Conrad (pp. 7-10) and thereafter the Referee handed down the following decision (fol. 19):

> "The undersigned Referee, after a careful consideration of the allegations, is of the opinion that the objection to the jurisdiction of the Referee is not well taken and should be overruled.
>
> A further date may be obtained from the Referee's office for the purpose of taking testimony."

A further date was fixed by the Referee pursuant to the express request of petitioners contained in Mr. Conrad's affidavit, which concludes with this statement (fol. 17):

> "This affidavit is filed with the express reservation of the right to a hearing as to the services rendered and a reasonable compensation to which deponent's firm is entitled by reason thereof, in the event that it ultimately be determined that the payment therefor comes within the purview of §60-d of the Bankruptcy Act."

Pursuant to the Referee's holding on the date thereafter set, the Trustee made proof of the allegations set forth in the petition with respect to the first count (pp. 14 *et seq.*). Petitioners on the return day asked that the entire matter be put over and that an intermediate order be entered at that stage of the proceedings in order that the objection to the jurisdiction might be tested out on appeal (fol. 24). To this proposal, the Trustee entered objection, maintaining that regular procedure required that petitioners give proof as to their services, without requiring the Trustee to try out every issue piece-meal.

The Court's attention was further directed to petitioners' request for a hearing as to their services (fol. 24):

> "I ask your Honor to direct the respondents (pe-

> titioners in this Court) pursuant to their own request set forth in their affidavit filed in this proceeding * * * to appear and give such proof as they desire with respect to the services they have rendered in order that your Honor can determine the reasonableness of the fee paid to them."

Petitioners contended that to give proof as to their services would be tantamount to a waiver of their jurisdictional objection (fols. 24-26), even though the Trustee proposed that petitioners give any proof desired with the understanding and concession that any such offer would be without prejudice to their subsequent right to oppose on jurisdictional grounds (fols. 26, 30). The Referee refused to sign an interlocutory order on the authority of *Childs* v. *Ultramares Corporation*, 40 F. (2d) 474 (C. C. A. 2), in which the Court held that such an order was not appealable. The Referee overruled the objection of petitioners who remained in the courtroom during the presentation of the Trustee's case (fols. 23-30).

It is submitted that a party making timely objection on the question of jurisdiction, does not waive his objection by giving proof under Court compulsion. (See *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18; *Weidhorn* v. *Levy*, 253 U. S. 268).

The Referee held the payment unreasonable and fixed the allowance at $500. This disposition the district and circuit courts affirmed.

The Facts.

Despite some slight intimation in petitioners' brief (p. 6) to the contrary, there can be no dispute as to the facts giving rise to the application here involved. The pertinent allegations are set forth in the Trustee's petition (pp. 3-6). By filing a notice of motion to dismiss the

Trustee's petition on the ground that "each count thereof fails to state facts sufficient to constitute a claim within the jurisdiction of the said Referee and that same is insufficient in law upon its face" (fol. 12), petitioners were, as a matter of law, filing a demurrer and thereby conceding the existence of every fact alleged by the Trustee.

The only purpose of the Trustee in going forward and giving proof was to establish for the Court the nature of the services rendered by petitioners in view of their refusal to present proof in line with their previous request.

The facts involved are carefully summarized in his opinion by Circuit Judge Swan, 61 F. (2d) 771 at 772; Record, page 49, as follows:

> "The corporation was in financial difficulties and unable to meet its maturing obligations. Prior to retaining the appellants, it had engaged another attorney, Mr. Pratt, to negotiate a settlement with its creditors, and a meeting with some of its creditors had been held. Apparently the appellants were retained to supplement the efforts of Mr. Pratt, to whom $750 had already been paid upon a promised fee of $2,000. Mr. Conrad's testimony given at an examination under section 21 (a), (11 U. S. C. A. 44, a) was to the effect that he was to negotiate with creditors for a 50 per cent. cash settlement and was to assist the corporation in hypothecating its accounts receivable in order to obtain the necessary money to carry out such a settlement. His affidavit submitted in opposition to the referee's jurisdiction states that the most extreme course which was within the contemplation of himself and Mr. David Bell, the Bankrupt's president, was continuance of the business under an equity receivership, although that course was not contemplated if the business could be continued under the supervision of a committee of creditors, or a representative of the New

York Creditors Adjustment Bureau, Inc. It also appears that within two weeks prior to November 5th, when the appellants' retainer was paid, David Bell had withdrawn $1500 from the corporation, and his brother, who was an employee, had withdrawn $750. The cash resources of the corporation were so low that the appellants' retainer could not be paid until a sale of merchandise was made; the purchaser's $2500 check was then endorsed to the appellants. Upon these facts the district court concluded that the thought of bankruptcy was the impelling motive of the debtor corporation when its president retained the appellants. Hence the payment was held subject to summary re-examination."

For a detailed statement of the services rendered the Court's attention is invited to the examination (pp. 7-10) under § 21-a of Mr. Conrad, from which it appears that in accepting his own version of what was accomplished, the services rendered consisted solely of a number of conferences, not a single scrap of paper being prepared by him nor his firm, nor a docket entry being made in connection with the case (fols. 41-44). Served with a *subpoena duces tecum*, he had not even a file to produce at the examination and was compelled to admit that there were no papers in his office relating to the case (fol. 41). Subsequent to the examination, as part of his affidavit upon the institution of these proceedings, he did produce an alleged balance sheet of the bankrupt to indicate solvency of the company, a document which he did not produce at the § 21-a examination.

It appeared that on October 29, 1930 the bankrupt called a meeting of its creditors to discuss its financial difficulties (fol. 7).

POINT I.

The facts alleged in the Trustee's petition all of which are admitted by petitioners' motion to dismiss, clearly establish a claim within the purview of §60-d of the National Bankruptcy Act.

In line with the approval indicated by this Court in *Wood* v. *Henderson*, 210 U. S. 246, the Trustee in instituting this proceeding, adopted the practice suggested by text-writers on bankruptcy, which this Court indicated is "entitled to much respect" (210 U. S. 257).

A discussion of the section here involved may be found in Collier on Bankruptcy, 13th Edition 1923, Volume 2, pages 1334-39 and Remington Bankruptcy, 3d Ed. §2726.

In view of petitioners' motion to dismiss, the Referee had but to read the Trustee's petition and determine if the facts set forth established a case within the section. Having made a finding to that effect, petitioners were under duty to give proof as to the value of their services, either by oral testimony or filing an affidavit. Here the petitioners made special request for "a hearing as to the services rendered" (fol. 17). Upon their refusal to give such proof, the Trustee submitted to the Court as admissions against interest the affidavit of Mr. Conrad (pp. 7-10) and his examination under §21-a of the bankruptcy act.

With all of the facts before him, the Referee properly fixed the value of petitioners' services concerning which petitioners at no time in these proceedings, have raised any question.

POINT II.

A person is very much in contemplation of the thing he wishes to avoid.

The essence of petitioners' position amounts to the claim that their client at no time desired bankruptcy, the

hope being that a 50% settlement or extension might be consummated with creditors.

According to the affidavit of Mr. Conrad, the matters discussed at the time of his retention were as follows (fol. 16):

> "The services to be rendered by your deponent consisted in doing things which would of themselves negative the possibility of a liquidation in bankruptcy. The most extreme course which was within the contemplation of your deponent and of Mr. Bell was the continuance of the business under the supervision of an equity receiver, even though that course was not contemplated if the business could be continued under the supervision of a Committee of Creditors or a representative of the New York Credit Men's Adjustment Bureau, Inc."

Mr. Conrad's testimony established that he was offering a 50% settlement to creditors (fols. 48-50).

In the matter of his retainer, Mr. Conrad further testified (p. 28, fol. 43):

> "Q. When was the matter of compensation arranged? A. At the first meeting I had in this matter.
>
> Q. And what was the conversation in that connection? A. Mr. Belsky asked how much I would charge and I told him my usual fee in these matters is $5,000; that I was not interested in any proceeding between a debtor and his creditors for a lesser amount. He thereupon asked me if I would do something better."

It further appears that there was some difficulty in prospect for his client with respect to an alleged false financial statement that had been issued (p. 30, fol. 46).

> "Q. Well, what was the difficulty in connection

with the financial statement? A. Well, the usual trouble that you find in this kind of cases, where creditors claim statements to be false, and, of course, getting around it in a manner that you placate these creditors, in order that they may be in a position to accept, or even consider a settlement."

In connection with his retainer, Mr. Conrad significantly testified as follows (p. 30, fol. 46):

> "Q. Was there any talk as to how this $2,500 was to be paid, and when? A. Cash; to be paid in cash. They told me they would have a check at my office either the next day or the following Monday; and they did.
>
> Q. I assume that you refused to act until you got that payment? A. That is right."

Petitioners' insistance upon cash in a case where a settlement was proposed, in a situation where an equity receivership or an assignment for the benefit of creditors was under consideration, should lead any reasonable person to the conclusion that bankruptcy was contemplated but not desired.

Judge Swan's comment in that connection is an apt one (61 F. (2d) 773):

> "That the retainer in the case at bar was paid in contemplation of bankruptcy seems too clear to admit of controversy. When the client and attorney are considering an equity receivership in case the creditors will not accept an offered settlement, it is inconceivable that the imminence of bankruptcy and the avoidance of it is not present in their thoughts."

At page 772, the same Court observed:

> "When a debtor is in such straits that he knows

> he is likely to end in the bankruptcy court and he engages an attorney to take steps to prevent it, a payment in advance for services of that character would seem clearly to fall within the literal terms of that statute; the payment is made 'in contemplation of bankruptcy' no less when made to fend against it than when made to bring it about."

Judge Caffey, in this case, writing in the District Court made an equally cogent comment (52 F. (2d) 755, at 756):

> "Upon the present record, the referee was fully warranted in concluding, and I think from the circumstances that the inference is inescapable (*cf. Quinn* v. *Union Nat. Bank* (C. C. A.), 32 F. (2d) 762, 767, 768), that, when the debtor engaged the respondents, he contemplated bankruptcy. Accepting the testimony of one of the respondents, it appears incontrovertibly that the employment was exclusively for the formulation of arrangements that would have adjusted affairs of the debtor in some fashion with all of his creditors and would have affected, for the benefit of the estate, all the assets of the debtor. As it seems to me, it is wholly consistent with the language of section 60d to construe the jurisdiction there conferred to embrace authority summarily to fix the reasonable value of fees for services in such matters, including attempted adjustments designed to avoid bankruptcy, and that it would render some of the language surplusage or meaningless to construe the jurisdiction as excluding this subject.
>
> There must be plain and strong ground for depriving language of a statute of full operation before the court is justified in confining it to a field more restricted than that comprehended within the literal words. Nullification of the words in the statute by implication, such as is sought by the argument that the two sections discussed are completely correlative, is not favored in the law. I have been unable to find

> any warrant for limiting the natural application of the phraseology in section 60d so as to remove from it services of the character that were performed by the respondents."

The decisions in this case have been favorably commented on in an article in the Yale Law Journal (January, 1933), and after a full and complete discussion of the authorities, the editor observes, 42 Yale Law Journal 434, 435:

> "The result reached in the principal case would seem reasonable. Certainly a debtor acts very much in contemplation of a result which he employs counsel to avoid."

The conclusion is supported by a number of authorities below cited:

> *In re Klein-Moffet Co.* (D. C. Md. 1928), 27 F. (2d) 444, 445, per Coleman, *J.*:
>
> "Although (the attorney's services) rendered over a period of extreme financial difficulty *in an effort to** *keep the business out of bankruptcy, the services were nevertheless in contemplation of bankruptcy.*" (Citing *Furth* v. *Stahl, infra.*)

In the opinion at page 445 the Court summarizes the services rendered by the attorneys in the *Klein-Moffet* case as follows:

> "The general nature of the services, insofar as is here material, was that they were rendered in an effort *to adjust the financial difficulties of the company.*"

The Court then proceeds to detail some of the services performed for which payment was made and points out among other things that

> "counsel was engaged in an endeavor *to rehabilitate*

* Unless otherwise indicated italics throughout this brief are the writer's.

> *the corporation* * * *. His work involved numerous conferences with stockholders and creditors, and, in general, *such labor as is usually incidental to efforts to reorganize* AND AVOID BANKRUPTCY."

Quinn v. *Union National Bank*, 32 F. (2d) 762 (C. C. A. 8), Kenyon, *C. J.*, discussing a definition of "in contemplation of bankruptcy" at pages 766 and 767, concludes 768:

> "To say that his action under all these circumstances was not in contemplation of bankruptcy is to say that he did not intend the natural consequences of his action, and that his mental contemplations were different from those of the average and general run of mankind. There was more than a mere possibility of bankruptcy proceedings arising on Ewert's financial condition."

In re Lang, 20 F. (2d) 239, (D. C. E. D. Pa. 1927), Kirkpatrick, *D. J.*, at page 240, held:

> "There will almost always be a period in the history of any insolvent during which he realizes his difficulties and faces the possibility, or even probability, of ultimate bankruptcy. At such a time, he will (p. 241) require the services and advice of counsel, *frequently with the hope of avoiding bankruptcy proceedings altogether.*"

In *Furth* v. *Stahl*, 205 Pa. St. 439, 443, 55 Atl. 29, 30 (1903), the Supreme Court of Pennsylvania said:

> "The services of the plaintiff belong to this class. They were none the less rendered in contemplation of the filing of a petition in bankruptcy, because directed primarily and principally *to the prevention of such petition. A man is usually very much in contemplation of a result which he employs counsel to avoid.*"

Furth v. *Stahl* was cited with approval by this Court on other grounds in *Wood* v. *Henderson* cited *supra*. For other instances in which Courts have recognized that attempts by attorneys to unravel complicated financial affairs, constituted cases within the terms of the statute, see *In re Cummins* (D. C. S. D. N. Y. 1912), 196 Fed. 224; *Slattery* v. *Dillon*, 17 F. (2d) 347, (C. C. A. 9, 1926).

Slattery v. *Dillon* emphasizes that the making of an assignment for the benefit of creditors is good evidence of the probability that bankruptcy might ultimately follow.

Mr. Conrad's affidavit specifically states that it was the desire of the parties that "the business * * * be continued under the supervision of a committee of creditors or a representative of the New York Credit Men's Adjustment Bureau" (fol. 16, p. 9). This arrangement is tantamount to an assignment if not a surrender of the bankrupt's property for the benefit of creditors.

POINT III.

The Bankruptcy Court has the power to fix summarily the value of services of an attorney retained by the debtor two weeks before the bankruptcy petition to negotiate for a settlement with creditors.

This Court has indicated the purpose of the section in question. Quoting with approval in *Wood* v. *Henderson*, cited *supra*, from the decision of Judge Severens in the case of *Pratt* v. *Bothe*, 65 C. C. A. 48, 130 Fed. 670, Mr. Justice Day, writing for the Court, observed:

> "It would rather seem that Congress, engaged, as many signs indicate, in guarding the assets of those in contemplation of bankruptcy, to the end that they might be brought, without unnecessary expenditure, to the hands of the trustee for distribution to creditors, while it would not deny to the debtor the right

> to employ and pay for legal assistance in his affairs *during that critical period*, yet proposed a restraint upon that privilege by requiring that such payment should be reasonable in amount,—in short, proposed to apply *to the incipient* stage of bankruptcy the provident economy which it sought to apply to the administration of the bankrupt's estate. It may have been thought that there was the same reason for such restraint at that stage of affairs as subsequently. And it is to be observed that the transaction would not become the subject of revision unless bankruptcy ensued. It put attorneys, solicitors, and proctors in no worse position that it did some other classes of those having business with the debtor."

Especial importance must be ascribed to the use of the words "the incipient stage of bankruptcy" and "during that critical period", all pointing to the assistance which the debtor requires *prior* to the filing of the petition.

In *Wood* v. *Henderson*, at page 253, the Court crystallizes the purpose of the statute:

> "Section 60d is *sui generis*, and does not contemplate the bringing of plenary suits for the recovery of preferential transfers in another jurisdiction. It recognizes the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him in view of financial reverses *and probable failure*. It recognizes the right of such debtor to have the aid and advice of counsel and, in contemplation of bankruptcy proceedings which shall strip him of his property, to make provisions for reasonable compensation to his counsel. And, in view of the circumstances, the act makes provision that the bankruptcy court administering the estate may, if the trustee or any creditor question the transaction, re-examine it with a view to a determination of its reasonableness."

It is submitted that the language referring to protection

against "probable failure" indicates that the services contemplated by the statute must in part consist of attempts to avoid the anticipated failure.

This Court has indicated in the *Wood* case the special purpose for which this statute was enacted (210 U. S. 251):

> "Section 60d added a feature to the bankruptcy act not found in former acts regulating practice and procedure in bankruptcy; therefore adjudications upon other provisions of the bankruptcy act, or concerning the judiciary act giving jurisdiction to the courts of the United States, have no binding effect in the construction of this section."

At page 258 of the same opinion, Mr. Justice Day held:

> "This section in effect confers a special jurisdiction in a bankruptcy proceeding; it is only available when property has been transferred in contemplation of the filing of a petition in bankruptcy. When the affairs of one about to be adjudicated a bankrupt are in that situation, then the act, recognizing the right of the bankrupt to legal services to be rendered, undertakes to prevent the diminution of the estate to be administered and distributed for the benefit of creditors beyond a fair provision for counsel under such circumstances. To the extent that the provision is unreasonable the transfer is not given the effect to separate the property from the bankrupt's estate. As to this excess, the estate comes, within the meaning of the bankruptcy act, within the jurisdiction of the court, and will be ordered to be restored and administered for the benefit of creditors."

The decision in this case, therefore, turns upon the facts here presented. The Referee has made a finding that the services were rendered "in contemplation of bankruptcy". His decision has been in turn affirmed by the district and

circuit court. No reason appears for any interference with that conclusion, in view of the above indicated purpose of the statute.

Circuit Judge A. N. Hand, writing for the Second Circuit in *Re Falk*, 30 F. (2d) 607, (C. C. A. 2), has stated the purpose of §60-d as follows (p. 609):

> "The object of section 60-d was to afford the bankrupt representation by counsel, who would not have to take chances as a general creditor, but might know that a reasonable fee was assured, and hence would be zealous to render active service in what is often a difficult situation. *It also safeguarded the estate by enabling the trustee to secure a summary re-examination of the propriety of any fee paid.*"

Petitioners insist they were retained not in contemplation of bankruptcy, but to prevent that very result—their sole alleged function being to effect a settlement or an extension. Accepting their claim we have but to examine the authorities cited to conclude that the law is logical, and readily infers that when a man offers a settlement, bankruptcy although not the desideratum, is something which may normally follow.

Considerable emphasis is placed in petitioner's brief upon the fact that the services rendered must be "germane" to the aims of the Bankruptcy Act. With this proposition, the Trustee takes no issue and submits that an attempt to negotiate with creditors to effect a settlement is not inconsistent with the aims and purposes of the Bankruptcy Act, which itself provides for accomplishing that very result (see §12, 11 U. S. C. A. 30, regulating compositions).

In addition to objecting to the jurisdiction of the court to entertain this application, the petitioners who are ostensibly appearing only for a special purpose at the same time moved to strike out certain allegations of the petition, claiming irrelevancy (fol. 12). It is submitted that they

must adopt one position or the other, but waiving technical considerations, their position is demonstrated by their brief as without validity in fact or in law.

In extenuation of the allegations made in the petition, the court is referred to *Tripp* v. *Mitschrich*, 211 Fed. 424, (C. C. A. 8), cited by petitioners. In that case the court pointed out that the question of whether the transfer was "in contemplation of bankruptcy" depended upon a determination of "human motive" and therefore, resort must be had to "the surrounding circumstances".

The court held at page 428:

> "With this as the meaning of section 60d, there simply remains for determination in a given case whether this state of mind existed and actuated in the transfer involved. In ascertaining such, as in determining all human motive, we enter upon a domain where circumstances must usually be relied upon for enlightenment. True, the express statement of the party in making the transfer may afford direct evidence of the actuating thought. But more ordinarily this is to be ascertained from the surrounding circumstances. Or in still other cases it is to be determined by reasoning back from what he did to what he must have had in mind in so doing."

In view of this decision the Trustee, to give the court below a complete picture, indicated certain salient facts which conclusively establish that the bankrupt's business was on the brink of disaster. It was admittedly in difficulties and unable to meet its obligations.

On October 23, 1930, Mr. Pratt, an attorney, was retained to effect a settlement at an agreed retainer of $2,000 of which he was immediately paid $750.00 on account. Between October 1st and November 5th David Bell, the president of the company, withdrew from the business for his own use and benefit $1,500, and between October 23rd and November 11th, his brother, an employee of the company, with

drew $750.00 and on November 3rd petitioners were paid $2,500 by transferring a check of an account receivable of the company since the bank balance was only nominal.

It is a familiar experience in cases of this type for officers of the company, "insiders" and relatives to begin making substantial withdrawals after an attorney has been retained to effect a settlement and it is common knowledge that the situation is thus being prepared in contemplation of what may thereafter happen, among which possibilities the circumstance of bankruptcy is not unduly remote.

Tripp v. *Mitschrich* relied on by petitioners, involved a case in which the court held that the retention was not in contemplation of bankruptcy, for in that situation the company's physical assets had been wiped out by a fire and an attorney had been specially retained on a contingent basis to recover on a fire insurance policy for the loss. That situation admittedly negatived the possibility of bankruptcy. There moreover was never a transfer of property by the bankrupt to the attorneys, counsel in that case merely receiving a contract to be reimbursed to the extent of thirty per cent. of any recovery realized by them on the fire loss.

Petitioners elaborate at great length upon the fact that debtor was not insolvent. It is submitted that there are various degrees of insolvency. Under the law of the State of New York, inability to meet maturing obligations rendered the company insolvent (see *Davis* v. *Seneca Falls Mfg. Co.* (1927), 17 F. (2d) 546, (C. C. A. 2).

Emphasis is placed upon the fact that a balance sheet as of September 30, 1930 (p. 11) established solvency. No figures are advanced, however, to establish the condition as of the date of counsel's retention more than a month later. Nor is explanation suggested for the depletion of the $6,000 cash available on the September balance sheet by payment to officers for *back salaries* in October and November of $2,250. No reason is assigned for the retention of Mr. Pratt

at an agreed retainer of $2,000, of which $750 was paid on account, nor for the unusual procedure of selling merchandise and turning over to Conrad the purchaser's check of $2,500. It is fair to suggest that the manner of emptying the $6,000 bank account, instead of paying creditors, resulted in what petitioners' brief (p. 10) describes as "the ill advised act of a small group of creditors" who filed the petition.

Conrad testified (p. 28, fol. 44) that the assets and liabilities were equal; if the company were solvent the margin of safety was very slight.

It is, however, significant that this corporation, supposedly solvent as it is here claimed, when the petition was filed, with its affairs in the hands of counsel who had been paid $2,500, took no steps to oppose the involuntary petition by denying the allegations or filing an answer claiming solvency, action which counsel might have taken for the company if the prospect of settlement were as favorable as is claimed. It is apparent from an examination of the date of the petition, November 17, 1930 and the date of the adjudication, four days later, November 21, 1930 (fols. 6, 7), that the company was adjudicated a bankrupt *on consent* since under § 18-b of the Bankruptcy Act, the time to plead to the petition could not have expired. Petitioners suggest (p. 10): "The petition herein was filed by certain creditors for reasons which we are unable to understand", and at page 10 of their brief, it is charged that the bankruptcy was the ill considered "act of a small group of creditors". Significantly creditors did not oppose the bankruptcy by filing an answer as is their privilege under § 18-b (11 U. S. C. A. 41-b).

As of the date of the petition, there can therefore be no question that the company was insolvent for certainly during the two weeks interval between petitioners' retention and the filing of the petition, no great change in affairs occurred to convert David Bell Scarves, Inc. into an insolvent condition, which had already existed for some time prior.

Petitioners are endeavoring to oust the Referee of jurisdiction. It is submitted that this attempt should not be countenanced, since it would be repugnant to the spirit and purpose of the statute, in view of the circumstances of this case and in addition would be fraught with the possibilities of creating a dangerous precedent. If petitioners are successful in their contention, every attorney who receives an exorbitant fee shortly before petition date, need but come into this Court and announce through himself or his client that he was retained not in contemplation of bankruptcy but for the purposes of negotiating a settlement, with the result that the bankruptcy court in such cases will be automatically deprived of its summary powers, and a new way opened to extract assets which are the property of creditors.

The entire scope and spirit of the administration of the Bankruptcy Act is to insure the keeping down of administration expenses to a reasonable minimum. For that purpose the district courts have promulgated special rules. This Court has enacted general orders with the same end in view (see General Orders 42-44).

Under General Order 38 in prescribing a set of forms in bankruptcy, 174 U. S. 1194 at page 1204, this Court has directed that bankrupts shall under oath make special answer to this inquiry: "What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy." The purpose of this query is to lay the foundation for proceedings under the statute now before the Court. To sustain or in anywise recognize the position of petitioners will mark a complete and radical departure from the liberal construction thus far given this particular section.

The discussion by petitioners and the authorities cited in connection therewith as to the distinction between §60-d and §64-b, 3 (11 U. S. C. A. 104b, 3), are not material, since all of the services in question were rendered *prior* to the bankruptcy.

Cases construing the latter section which deals only with applications for allowance for services in bankruptcy therefore have no application.

For the same reason reference to *Randolph* v. *Scruggs*, 190 U. S. 533, is beside the point; that case in no wise involved the section in question. It dealt with an application for an allowance filed under §64b, 3 by an attorney for an assignee who had the temerity to claim priority for services rendered in *contesting* an adjudication in bankruptcy. Mr. Justice Holmes held (190 U. S. 540):

> "No ground appears for allowing the item for services in resisting an adjudication in bankruptcy."

In re Geller, 216 Fed. 558 (D. C. N. J.), stressed by petitioners (p. 13) likewise has no application, the opinion itself in that case indicating that (216 Fed. 562) "the referee did not presume to act under Section 60d".

CONCLUSION.

It is respectfully submitted that the petitioners have shown no reason in law or in fact which would justify this Court in disturbing the decisions of the three courts below.

Respectfully submitted,

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